

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

MARY SAMPSON)	
Claimant)	
VS.)	
)	Docket No. 210,444
KEY INDUSTRIES, INC.)	
Respondent)	
AND)	
)	
TRAVELERS INSURANCE COMPANY)	
Insurance Carrier)	

ORDER

Claimant appeals from an Award entered by Administrative Law Judge Steven J. Howard on July 24, 1997. The parties have waived oral argument and ask that the case be decided on the record and briefs presented.

APPEARANCES

Claimant appeared by her attorney, Carlton W. Kennard of Pittsburg, Kansas. Respondent and its insurance carrier appeared by their attorney, Leigh C. Hudson of Fort Scott, Kansas.

RECORD AND STIPULATIONS

The Appeals Board has adopted and considered the record listed in the Award. The Appeals Board has also adopted the stipulations in the Award.

ISSUES

The sole issue on appeal is the nature and extent of claimant's disability. The Administrative Law Judge limited the award to functional impairment, finding that claimant failed to make a good faith effort to perform the duties of an accommodated position offered by respondent at a wage which was 90 percent or more of the pre-injury wage.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the arguments, the Appeals Board concludes that the Award by the Administrative Law Judge should be affirmed.

Claimant injured her low back on June 13, 1995, while bending over to pick up a bundle of overalls in the course of her employment for respondent. At the time of the injury claimant worked as a joiner, work which involved joining the front and back of overalls using a sewing machine. Respondent provided medical treatment and paid temporary total disability benefits for 24 weeks from June 14, 1995, to November 28, 1995. The record indicates that in November of 1995 claimant declined an offer for a pain management clinic but the record is otherwise devoid of evidence regarding claimant's activities for the period November 1995 until an attempted return to work in December 1996.

In December of 1996, respondent offered claimant a different job, one operating a sewing machine for buttonholes. This position did not involve lifting. Claimant worked for respondent in the offered employment for approximately 3½ hours. Claimant left claiming she was not able to perform that job. The Administrative Law Judge found that claimant failed to make a good faith effort to perform those duties and the Appeals Board agrees. The job was described and a videotape of the job shown to Dr. David A. Tillema. Dr. Tillema performed an independent medical examination at the request of the Administrative Law Judge. Dr. Tillema concluded claimant could perform those duties within the recommended restrictions. Dr. Tillema also testified that if claimant stopped attempting that job in less than a half day, as claimant did, it was his opinion there was something other than the orthopedic problem involved.

There is some suggestion in the record that claimant should be entitled to work disability during the period November 28, 1995, through December 30, 1996. As indicated, the record does not indicate what claimant's activities were during that period. To be entitled to a wage loss based upon the actual wage loss, the claimant must establish that he or she has made a good faith effort to obtain employment. Copeland v. Johnson Group, Inc., 24 Kan. App. 2d 306, 944 P.2d 179 (1997). In this case, there is no evidence that claimant attempted to obtain employment. This case was tried before the Copeland decision. The lack of evidence is, therefore, understandable. The Board is nevertheless bound by Copeland. The Board finds it reasonable to impute a wage of 90 percent or greater during that period. Claimant would, therefore, be limited to functional impairment only.

The Administrative Law Judge has adopted the functional impairment rating by the independent medical examiner, Dr. Tillema. He rated the claimant's impairment as 5 percent to the body as a whole. The Appeals Board agrees with and affirms that finding.

AWARD

WHEREFORE, the Appeals Board finds that the Award entered by Administrative Law Judge Steven J. Howard, dated July 24, 1997, should be, and the same is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of February 1998.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Carlton W. Kennard, Pittsburg, KS
Leigh C. Hudson, Fort Scott, KS
Steven J. Howard, Administrative Law Judge
Philip S. Harness, Director